

No. 11557.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM GATHER KELLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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*To the Honorable the Ninth Circuit Court of Appeals of
the United States:*

Jurisdiction.

Jurisdiction is conferred by Section 41, Title 28, U. S. Codes and by Section 225, Title 28, U. S. Codes. The punishment provided for violation of the law involved includes imprisonment for not more than five years.

The defendant was indicted for violation of two provisions of Title 18, Section 318, U. S. Codes. He was a custodial laborer in the United States Postal Service in the Post Office in Los Angeles, California. He waived a jury [Rep. Tr. p. 4], and was tried by the Honorable Wm. C. Mathes, Judge of the District Court. He was found guilty of both charges and judgment thereon was, on February 10th, 1947, pronounced whereby he was sen-

tenced to serve two years imprisonment by reason of conviction under the first Count and two years suspended sentence on the second, the sentences to run consecutively. [Rep. Tr. pp. 7, 8.]

Statement of the Case.

The charging part of the indictment reads:

“The grand jury charges:

COUNT ONE

(U. S. C. Title 18, Sec. 318)

On or about December 21, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant William Gather Kelley, being a person employed in the United States Postal Service as a custodial laborer in the Los Angeles, California, Post Office, did secrete and embezzle a package which came into his possession as said custodial laborer, and which was intended to be conveyed by mail, addressed to Mrs. E. Johnson, 1706 South Hoover, Los Angeles, California. (2)

COUNT Two

(U. S. C. Title 18, Sec. 318)

On or about December 21, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant William Gather Kelley, being a person employed in the United States Postal Service as a custodial laborer in the Los Angeles, California, Post Office, did unlawfully detain, delay, and open a package which came into his possession as said custodial laborer, and which was intended to be conveyed by mail, addressed to Mrs. A. S. Cluff, 2026 South Burnside, Los Angeles, California.” [Rep. Tr. pp. 2 and 3.]

We copy Section 318, U. S. C. below but add the paragraphing so as to indicate the separation of the two offenses which it describes:

“Whoever, being a postmaster or other person employed in any department of the postal service, shall unlawfully detain, delay, or open any letter, postal card, package, bag, or mail entrusted to him or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any carrier, messenger, agent, or other person employed in any department of a postal service, or forwarded through or delivered from any post office or station thereof established by authority of the Postmaster;

Or who shall secrete, embezzle, or destroy any such letter, postal card, package, bag or mail; or shall steal, abstract, or remove from any such letter, package, bag, or mail, any article or thing contained therein, shall be fined not more than \$500.00, or imprisoned not more than five years, or both . . .”

The questions to be relied upon are covered by a limited portion of the reporter's transcript; hence other portions will be pointed out giving the substance, only of the testimony to be found in the reporter's transcription of the evidence.

The Government proved by Charles Franzen, Assistant Superintendent of Mails that on December 21, 1946, he received from Inspector R. E. French two packages, both of which he identified, the first of which was addressed to Mrs. E. Johnson at a named address, and was marked “Government's Exhibit No. 2”; the second when presented in court had been divided into two parts, which were numbered Exhibits 3 and 4. [Rep. Tr. pp. 17-19.]

The witness testified that he placed the packages at two stations in the Post Office as directed by Mr. French, Exhibit No. 2 in "Pico Heights Station" [Rep. Tr. p. 22] and the other package at "Station E," being places where mail is picked up [Rep. Tr. pp. 23, 24]; that later that morning Mr. French told Franzen to go to these stations and see if the parcels were still there; he did so and they were gone [Rep. Tr. pp. 24-26]; that he so informed French by signal [Rep. Tr. p. 24], and later Franzen and Kinny, foreman of janitors, returned to the Pico area where the defendant was working as a janitor [Rep. Tr. pp. 27-30]; that Franzen and Kinny got the trash hampers being used by the defendant, and dumped the contents on the floor and found therein Exhibit 2, intact, and the package Exhibit 4, with its wrapper torn off, the wrapper, being Exhibit No. 3. [Rep. Tr. pp. 30-34.] Franzen said he placed Government's Exhibit 2 on a wooden platform 8 inches or a foot above the floor beneath a metal rack in which mail bags are hung, and he put the other package on a tray at "Station E." [Rep. Tr. p. 23.]

The above is from the testimony of Franzen on direct examination.

Alfred E. French, testified that he was employed at said Post Office as "Post Office Inspector," and on December 21, 1946 saw the defendant Kelley; that the packages above mentioned had been prepared by him and Inspector Shore and Post Office Clerk Surdam; that Government's Ex-

hibit 2 was in substantially the same condition as when they prepared it, and Exhibits Nos. 3 and 4 were the same except that when prepared they were all one piece sealed with tape; that at 5 minutes after 5:00 A. M. of December 21, 1947, he handed the packages to Franzen and instructed him to place them where Franzen testified he placed them, and he, French went to the observation gallery and kept on outlook [Rep. Tr. pp. 60, 61]; that he saw Kelley get janitor utensils and sweep in the areas where the packages were placed, and that he saw Kelley pick up Government's Exhibit No. 2 and throw it in the direction of his trash pile [Rep. Tr. pp. 65-68]; that Kelley continued sweeping and French telephoned Franzen to look and see if he could find the packages, Exhibit No. 2. [Rep. Tr. pp. 71, 72.] Slight delay is not "unlawful," and a janitor who carelessly or inadvertently causes such delays cannot be held guilty of embezzling or unlawfully detaining packages intended to be conveyed through the United States Mail. That thereafter French left the gallery [Rep. Tr. p. 75], and eventually with Franzen with him and Kinny behind, French walked up to Kelley and asked where the package was that had been placed on the table and what he had done with it, and that Kelley said he denied that he had any knowledge as to what happened to the packages or having taken them. [Rep. Tr. pp. 86, 87.]

On cross-examination Mr. French stated that the reason that he presumed that Kelley wanted to secrete the package Exhibit No. 2 when he threw it onto the trash

pile was that he had received suspicious reports and complaints about Kelley, and things had disappeared from the part of the building where Kelley worked. [Rep. Tr. pp. 107-116.]

It was stipulated that Roy Kinney, foreman of janitors would testify as follows:

“Mr. Fitting: Mr. Kinney will testify that all the custodial laborers, including Mr. Kelley, were instructed that they were not to touch mail at any of the places where mail was customarily put or kept. He will also testify that if they found any mail or packages on the floor, or any places where mail did not belong, they were to pick it up and put it on any of the tables or racks that were around there [Rep. Tr. p. 144]”; also, that Kinney would testify “that his particular duties were to sweep all areas, including the cleaning of the sack racks; that the instructions with regard to the handling of mail was contingent upon his knowledge that it was mail.”

Greater detail in the statement of the evidence would be superfluous because appellant admits that the proof is sufficient in showing that the decoy letters were placed within the areas of the defendant's work as a custodial laborer and that he threw them into the hamper with the trash which he collected and that he denied all knowledge of their being in such trash.

The pertinent evidence which relates to the points relied upon on appeal will be set forth in connection with arguments upon them and the substance of all the pertinent evidence is set forth in the appendix to this brief.

I.

The Evidence Is Insufficient and There Is No Substantial or Competent Evidence to Support the Judgment.

1. The evidence fails to show that either of the alleged senders of packages intended them to be delivered to the addrses.

In *United States v. Matthews*, 35 Fed. 890, the defendant was indicted for violation of the first offense described in Section 5467 of the Revised Statutes, being the offense charged against Kelley in Count I of the instant indictment.

In discussing the element of the offense which requires that the letter there involved was "intended to be conveyed by mail" to the addressee the opinion states:

"A letter intended to be conveyed by mail is one which is intrusted to, or comes to the possession of, some postal employee to be transmitted, by means of the mail or mail agencies of the United States, to the person to whom, under whatever name, it is addressed; or, which is the same thing, to some person authorized to receive it, from the mail before or after it reaches the particular place to which it is directed. It cannot be that a letter is intended to be conveyed by mail, within the meaning of the statute, when the postal authorities, acting in co-operation with the sender, intended after the letter is put in the mail, to resume possession of it themselves, or to permit the sender to do so, before it reaches the hands of any carrier, messenger, or other postal employee, for delivery to the proper person." (35 Fed. pp. 894, 895.)

In the instant case it appears that the Government's Exhibit 2, which was addressed to "Mrs. E. Johnson, 1706 South Hoover, Los Angeles," and which pertains to the first Count, was never sent to the person to whom it was addressed, although Inspector French received it after Mr. Franzen found it in the defendant's trash. It appears that this exhibit had on it "cancelled United States postage stamps," at the time it was received in evidence and Mr. Franzen identified it. [Rep. Tr. p. 18.] Later in his testimony this witness swore that Exhibit 2 "is still in the same condition as it was when I placed it on the Pico rack." [Rep. Tr. p. 32.] However, he qualified this testimony by stating that certain initials had been placed on the exhibit in the Inspector's office after he found the package, and then said: "Except for those initials, that package is in the same condition." [Rep. Tr. p. 33.]

It is therefore incontrovertable that the cancelled United States postage stamps were on Exhibit 2 when it was handed to Mr. Franzen by Inspector French and when Franzen placed it as a decoy on a rack [Rep. Tr. p. 23], as directed by Inspector French.

What may have been the Inspector's purpose in using cancelled postage stamps on this decoy package is not a question for appellant to speculate upon.

The record contains no testimony or evidence tending to contradict Mr. Franzen's testimony above quoted to which defense counsel strenuously objected but the objections were overruled. [Rep. Tr. p. 32.]

No witness testified that Exhibit 2 was mailed to Mrs. Johnson after it had been repossessed by the Inspector.

It is to be noted that although he qualified his testimony later, Mr. French asserted that his purpose in having the package deposited on the rack was, "seeing the package in his hands." [Rep. Tr. p. 106.] Again the witness said "the purpose was to try to determine who was stealing these parcels on the third floor of the Terminal Annex"; and "that was the sole purpose"; and there was "no other purpose whatsoever but that." [Rep. Tr. p. 112.] However, when asked whether he had any intention of mailing the packages, Mr. French at first parried the question and finally said: "Well, I am sorry, but when you begin to get technical on it, then I have to tell you that there was a purpose for these articles to reach the addresses." [Rep. Tr. p. 113.] Hence, appellant insists that it is both logical and supported by the *Matthews* case decision to conclude that Exhibit 2 was not "intended to be conveyed by mail" to the addressee "or to be conveyed from the Inspector's possession to Mrs. E. Johnson at all."

This being the fact the offense charged in Count I was disproved by the Government's own witnesses, and the defendant's evidence fails to mention the condition of the exhibits or any other circumstance even remotely bearing upon this essential element of the sender's intent.

2. The offense charged in Count II has no support in the evidence and the judgment thereon is not sustained by the evidence.

The Government attorney elicited from Mr. Franzen the same lack of intent that Government's Exhibits 3 and 4 should be conveyed by United States mail to the addressee as has been shown in respect to Count I.

Exhibits 3 and 4 were identified by Mr. Franzen as a package [Ex. 4], originally contained in a wrapper; [Ex. 3], which wrapper bore "a six-cent cancelled United States postage stamp, bearing address to 'Mrs. A. S. Cluff, 2026 South Burnside Avenue, Los Angeles, California.'" [Rep. Tr. p. 19.]

Then, the following questions by the prosecutor and answers by Mr. Franzen were asked and given:

"Q. Now directing your attention to Government's Exhibits for identification 3 and 4, are they in the same condition as they were when you put them in Station E? A. No. When I put these in Station E they were wrapped in one parcel. I didn't see this at all when I put it down there.

The Court: That is the box, Exhibit 4 for identification?

The Witness: That is right.

The Court: It was wrapped in the wrapper, Exhibit 3 for (24) identification; is that what you mean?

The Witness: Yes, sir.

Q. By Mr. Fitting: Now directing your attention to the wrapper, Exhibit 3, that, again, has some initials on it, does it not, Mr. Franzen? A. Yes, sir.

Q. Were those initials on there when you placed that wrapper on the table in Station E? A. No; they were not.

Q. Are your initials on there, Mr. Franzen? A. Yes, sir; right here, 'C. O. F.'

Q. You are referring now to the initials in the lower left-hand corner of the front of the wrapper? A. That is right.

Q. Are your initials also on this box marked Government's Exhibit No. 4? A. Yes, sir; they are my initials.

Q. And they are in the upper left-hand corner, are they? A. Yes, sir.

Q. That is 'C. O. F.'? A. That is right.

Q. When did you put your initials on Exhibits 3 and 4, Mr. Franzen? A. I put my initials on there sometime later, down in (25) the inspector's office. I don't kow just when." [Rep. Tr. pp. 33 and 34.]

Hence with the exception of the wrapper having been removed from the package and certain initials having been placed on the wrapper, it is Mr. Franzen's testimony that the wrapper, with the address and the cancelled postage stamps on it was in the same condition when shown to him at the trial as when he "put them in Station E," on a tray. [Rep. Tr. p. 23.]

Exhibits 3 and 4 were found by Franzen in the trash which was dumped from Kelley's hamper by Franzen and Roy Kinny. [Rep. Tr. p. 31.] Mr. Franzen testified that the initials were placed on the packages in the Inspector's office after they had been found in the trash. [Rep. Tr. pp. 31-34.] Hence, the packages were traced back to the Inspector's possession and control but no one testified that unstamped postage was thereafter placed upon them or that they were ever re-mailed to the addressee. These decoy packages were purchased and put together by Inspector French, Postal Inspector Shore and Mr. French's secretary, Mr. Surdam. Shore addressed Exhibit 2 and Surdam addressed the one addressed to Mrs. Cuff. French said: "They were prepared in my

office.” He said that he and Inspector Shore paid for the articles which were put in the packages; that he did not know the addressees personally but they were Christmas presents to somebody. [Rep. Tr. pp. 113, 114.] Thus the preparation procedure actually followed is outlined and the Inspector gave these cancelled stamped packages to Franzen to put in the United States Mail by placing them at spots where they would be picked up for conveyance through the United States Mail. However, it is common knowledge that a letter or package with nothing but *cancelled* stamps on it would never reach the addressee, and it follows that for a postal inspector to deliberately deposit mail matter in the way of entering into the United States Mail using only cancelled stamps as postage clearly indicates an intention that they should be returned to him and that he had no thought of making Christmas presents to strangers.

3. The Evidence fails to show that the defendant secreted or embezzled the packages involved herein or unlawfully detained or delayed them.

Even if Kelley had tossed the package into his trash he would not have taken them out of the custodial custody of the Postoffice or out of the mail.

On cross-examination Inspector French testified that “trash goes to the basement,” and “it is sorted through” by a “custodial employee who is assigned to the duty.” [Rep. Tr. p. 135.] The purpose, he said, is to “screen the mail that might be lost in the trash”; that it is well known the “mail load increases tremendously during the 10 days before Christmas,” and, in the aggregate the probability of mail getting inadvertently mishandled or

lost becomes greater during that season. [Rep. Tr. pp. 137, 138.] Mr. French described the screening process as follows:

“I found several hampers setting around there that had trash in them, evidently, and found a screen that where they run the hamper up on an elevated platform and dump it and sort the trash through this screen and pull out any mail that might have inadvertently gotten in.” [Rep. Tr. p. 136.]

Kelley testified that the janitors put their trash in hampers, and take it to the basement in the elevators. He said “you carry it to the assorting room,” not to the incinerator [Rep. Tr. p. 155]; but the incinerator is also in the basement. [Rep. Tr. p. 153.]

From the foregoing it is shown that a very substantial amount of mail matter is found in the trash and that this is ordinarily regarded as due to inadvertence of employees, and the screening process is a part of the route through which all such screened articles pass in their transition through the mails. Of course all janitors are familiar with these facts and know that trash which is placed in hampers will be screened and that articles intended to be mailed will not be lost. They remain in custodial possession during the whole process as much as when being passed from one clerk to another, and the resulting delay is inconsequential and must be regarded by the Postoffice authorities as excusable, otherwise they would be subject to prosecution for the offense charged in Count I of the indictment.

II.

The Indictment Fails to Charge a Public Offense or Any Violation of Title 18 U. S. C. A., Section 318.

By the indictment an attempt is obviously made to charge offenses denounced in the above named section. Both counts employ language which indicates a design to charge the second offense defined in said Section 318.

Count I avers that:

“On or about December 21, 1946, William G. Kelley, being a person employed in the United States Postal Service as a custodial laborer in the Los Angeles, California Postoffice, did secrete and embezzle a package which came into his possession as a custodial laborer, and it was intended to be conveyed by mail, addressed to Mrs. E. Johnson, 1706 South Hoover, Los Angeles, California.”

The foregoing language is insufficient to the following respects:

1. This charge fails to aver the name of the sender of the package or to identify the sender in any way.

2. It fails to allege that the sender intended that the package should be conveyed by mail to the address and person addressed. In *United States v. Matthews*, 35 Fed. 890 the court held that to constitute the offense of secreting, embezzling, and destroying a letter intrusted to a postal employee, it is essential to a conviction that “such letter was intended to be conveyed by mail or carried or delivered by a mail carrier” or other person specified in the law.

If the name of the sender were given it might be implied that the language, “it was intended to be conveyed by mail,” etc., referred to that person.

3. It has been held that in laying this charge the pleading must aver that the property embezzled belonged to someone other than the accused.

United States v. Foye, Fed. Cas. No. 15,157;

United States v. Cummings, Fed. Cas. No. 14,695.

As the instant charge reads the package may have been prepared and mailed by the accused.

4. It is not averred that the accused intended to appropriate the package. It is said that he "did secrete and embezzle" the package, but this averment is a pure conclusion of law, and it was held in *Jones v. United States*, 27 Fed. 447, that where the accusation is in the language of the statute herein involved it is necessary to allege that the taking was wrongful and with felonious intent, citing *United States v. Carll*, 105 U. S. 611. As the *Jones* case opinion points out the crime denounced is "an aggravated larceny," and to constitute that offense the element of intent above mentioned exists although not found in the statute.

Count II alleges that the accused,

"did unlawfully detain, delay and open a package which came into his possession as said custodial laborer, and which was intended to be conveyed by mail, addressed to Mrs. A. S. Cluff, 2026 South Burnside, Los Angeles, California."

This count has the same defects as Count I except that it is alleged that the acts described were done "unlawfully." Count II attempts to charge the first of the two offenses described in said Section 318, and as it involves no element of misappropriation or larceny the term unlawfully may suffice.

However, it is insufficient because:

1. It fails to name or identify the owner or sender of the package.

2. It fails to aver that such owner or sender intended the package to be conveyed by mail to the addressee.

It requires no authority to show that the intent that the letter or package shall be conveyed by mail, etc., is essential because the wording of the first portion of Section 318 clearly includes that fact as an element of the offense.

Upon each of the foregoing counts appellant contends that the judgment below should be reversed.

Respectfully submitted,

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Attorney for Appellant.

APPENDIX.

The Evidence.

All of the evidence pertinent to the issues presented will first be set forth. The evidence intended to support the charges against Kelley consists chiefly of testimony of Post Office Inspector Alfred E. French. He stated that on the morning of December 21, 1946, he saw the packages which had been marked for identification, Government's Exhibits 2, 3 and 4, and that they "had been around in our office previously"; that they were prepared by Post Office Inspector Shore, Post Office Clerk Harvey Surdam, and himself. [Rep. Tr. pp. 59, 60.] He testified that on said date, at "five minutes after 5:00 he instructed Mr. Franzen where to put these packages and he "then proceeded to go to the observation gallery on the third floor." [Rep. Tr. p. 61.] The witness referred to Government's Exhibit No. 1, a diagram, and stated that he went to a point which he marked "E" thereon [Rep. Tr. p. 62]; he testified that it took him about 5 minutes to reach that point. He said Government's Exhibit for identification No. 5, was an accurate representation of the floor of the Post Office as viewed from the gallery at Point "E." [Rep. Tr. p. 63.] French said he saw Mr. Franzen place Government's Exhibit 2 on a sack rack shown on Exhibit 5 at a point marked "A," and saw him turn to his right toward the spot on said Exhibit 5, marked "B," taking with him Exhibits 3 and 4. [Rep. Tr. pp. 64, 65.] Mr. French said he saw Kelley at "about

5:15 A. M.”; saw him go to the janitors closet where Kelley “conversed for a few moments” with “another colored man,” and then “obtained his broom, walked over to a point West” of “the janitors closet” and start sweeping; he swept from the wall “on the West side of the building, east, out into the aisle.” [Rep. Tr. pp. 66, 67.] This sweeping is not shown on the diagram; the witness saw Kelley “go around and take the nearest route to the men’s lavatory, and French moved to another point in the gallery and observed Kelley until he left the lavatory and then at about 5:30, Kelley “started sweeping the pile of trash South.” French said: “I couldn’t see it (the trash pile) any too well underneath the gallery there.” [Rep. Tr. p. 69]; this point marked “F” is east of point “A.” Then from point “F” Kelley “came in to the Pico Heights Station Section, by going West from F, where he “picked up Exhibit No. 2 from the sack rack.” French said: “He looked at it a moment and then swung his body all the way around to the right and threw the package in the direction of the trash pile.” [Rep. Tr. pp. 70, 71.] Then, French said, Kelley pushed “the racks, the sack racks, up together more compactly, and then swept that area,” but before that that he emptied two waste paper baskets there on the trash pile and “then obtained some sweeping compound to throw over the pile and then swept that area out,” referring to the Pico Heights general area [Rep. Tr. p. 71]; swept this into pile “F,” and then “pushed that pile up the aisle, going South as before, using his broom. He did this to a point marked “G” in another Station. [Rep. Tr. p. 72.] “He then swept the area West of “G” and swept “that pile South down the aisle.” French said: “I saw him turn in at approximately the point

“H,” almost due East of “B.” [Rep. Tr. p. 73.] French said he did not see Exhibit 2 after Kelley threw it “toward the trash pile.” [Rep. Tr. p. 74.] French said:

“A. I waited at the observation point ‘E’ for a few moments, and then I telephone Mr. Franzen, the supervisor in charge of the building at the time, and asked him—I told him that the defendant, whom I later learned to be Kelley, had turned into the Station ‘E’ area at the southwest corner of the building, and instructed him to come out and see if he could find the package which he had placed at point ‘A.’ So I saw him come into that section and observe closely in every direction from the point where he had left the package, and then he stood there a moment and scratched his head, indicating to me that he could not find the package. I next saw the defendant about 5:45. I left the lookout gallery and went down through my office and around to the stairway in about the middle of the building, which is—

Q. Are you speaking of this? A. No; I am not speaking of that, but the area near the tie section, which would be off the diagram and to the north of the point ‘E.’ I then came down a place well out of sight on the east side of the building.” [Rep. Tr. pp. 74, lines 10 to 17 and lines 21 to 25; Rep. Tr. pp. 75, lines 6 to 13; Rep. Tr. p. 77.]

The witness said Government’s Exhibit for identification “No 6,” fairly depicts the scene that he could see from point “1,” and “I saw the defendant bending over the trash hamper . . . I mean this canvas tub which is generally used by the janitors in depositing their trash before taking it down to the basement. I saw the hamper at just before leaving the lookout gallery.” [Rep.

Tr. p. 79.] “I saw the hamper being pushed by Mr. Kelley down the aisle in the direction of the Station ‘E’ area. He was out of my observation for a moment when he went down to get the hamper. I could not see exactly the point. He came down the aisle north and turned to approximately past the point ‘C,’ and went over toward the northeast part of the diagram. The pile had already been put into the Station ‘E’ area.” [Rep. Tr. p. 80.] “I couldn’t observe the point at which he got the hamper, then at point he turned west with the hamper, as he had with the sweeping.” [Rep. Tr. p. 81.] I saw him go east past point “C”; then he got out of my sight, when he came back he had the hamper with him. [Rep. Tr. p. 81.] “I don’t know what Kelley was doing when I observed him bending over the hamper. [Rep. Tr. p. 83.] After I left the spot marked ‘I’ on Exhibit No. 1. [Rep. Tr. p 85.] I stopped in the placing table section or letter distribution area of the floor and sought to get in touch with Mr. Franzen.” [Rep. Tr. p. 86, lines 6-8.] “As nearly as I can remember, before reaching this aisle here we traversed approximately this route here from the point marked ‘C’ and into the aisle, and where we turned south.” [Rep. Tr. p. 87, lines 15-18.] “While on that route I saw Kelley as soon as I reached the area of . . . is that an ‘H’.” [Rep. Tr. p. 87, lines 20-21.] “Mr. Franzen was directly with me, and Mr. Kinny, I motioned for him to remain behind for a moment. Kelley was just standing there. I don’t really remember. I didn’t notice whether he had anything in his hand or not. I walked up to him and asked him where the package was that had been placed on the table. I had first asked Mr. Franzen where he placed the package, and he showed me where he had placed it on the table. And

I asked Kelley what he had done with the package. Kelley said, 'What package?' I would say that there was some conversation. I sent Mr. Franzen back to bring the trash tub into the area there, and in the course of that time, as I remember it, I told Mr. Kelley that there had been a package there and" [Rep. Tr. pp. 88-89, lines 3-4, 9-10, 13-14, 16-18, 20, 23; p. 88, line 1.] "And Mr. Kelley and I discussed the package. He disclaimed any knowledge of it and I asked him several He said that he didn't have any package and wondered what I was . . . and he asked what I meant by a package and. . . ." [Rep. Tr. p. 89, lines 6-7, 23-25.] "I told him that Mr. Franzen had left a package there on the table and now it was gone; there had been no one else in there and that he must know what had happened to the package; and he denied it. In the meantime Mr. Franzen had gone after the trash tub and he brought it up, and Mr. Kinny who, I believe, was close enough to observe what was going on, at that time came in and I felt of Kelley's clothing to see whether there was any bulk in there to indicate that he had taken any of the articles out of the packages and placed them in his pockets." [Rep. Tr. p. 90, lines 2-5 and 7-12.] I asked Mr. Kelley about the package marked for identification Government's Exhibit 2, referred to as the "Pico package." [Rep. Tr. p. 91.] "I asked him what he did with the package that he had taken from the sack rack. He said that . . . he denied having taken any package there and said he didn't know what I was talking about. By that time Mr. Kinny and Mr. Franzen were right there along with Kelley and myself and the trash tub, and I reached into the trash to see if I could find the packages in it and could not do so at first; and so we decided to

turn the hamper upside down and dump all of the trash out onto the floor, and we first found this package. Exhibit No. 2. And then I think Exhibit 3 was the one that we found next, and then we found the wrapper, or it might have been vice versa, they were found so nearly or close to each other in point of time." [Rep. Tr. pp. 92, 93.]

By Mr. Fitting: Now, Mr. French, did you see anyone go into the area marked "A" on this diagram in the period between the time that Mr. Kelley threw the package out and Mr. Franzen came in the second time to see if it was there?

"There were three or four mail handlers who came in there." "In all that time while I was watching I did not see anyone go in the general area marked 'B.'" [Rep. Tr. p. 95.]

Cross-examination by Mr. Townsend:

Concerning the packages, Exhibits 2, 3 and 4, Mr. French testified: "Postal Office Inspector Shore and my secretary, Mr. Surdam, and myself prepared these packages. There was a pair of socks placed in one of them and one or two handkerchiefs placed in the other. Mr. Surdam addressed this Exhibit 3 and Mr. Shore addressed Exhibit 2. Mr. Surdam, my secretary, addressed Exhibit 3. The one addressed to Mrs. A. S. Cluff was addressed by Mr. Surdam. They were prepared in the office. The purpose was to try to determine who was stealing these parcels on the third floor of the Terminal Annex." [Rep. Tr. pp. 124-125.] "Mr. Shore addressed Exhibit 2. The sole purpose of their being prepared was to determine who was stealing parcels. No other purpose whatsoever

but that. They were mailed. They were duly mailed and addressed and the return address . . . rather, the addressees are living people, and if they had gone through they would have been given to those people. There would have been a purpose in them reaching the addressees if they were not taken before that. The purpose would have been for them to reach the addressees. That was the prime purpose, to see if they would reach the addressees.” [Rep. Tr. pp. 126-127.] “When you begin to get technical on it, then I have to tell you that there was a purpose for these articles to reach the addressees. There were more return addressees on them. C. C. Heaven was the sender. He is a real person. Mrs. E. Johnson is the addressee on them. She is a real person. She was an acquaintance of one of the group, not of myself. I think she was probably an acquaintance indirectly of possibly Inspector Shore. The contents of the package were purchased as a Christmas present for somebody; partially out of my money. I bought a Christmas present for someone whom I admittedly do not know.”

Mr. French described the incinerator room and the process of screening mail for letters and packages inadvertently mixed up in trash, and in that behalf testified: “I don’t know what they do with the trash. Not in detail; no. I know that the trash eventually arrives in the basement, but just what route it takes to get there I would not be able to tell you. I do not inspect where the custodial labor would carry their trash. I know that trash goes to the basement, and it is sorted through. The custodial employee who is assigned to the duty does the sorting through. The other day I was down in the room where they sort through the trash. But I don’t

know where they took it from. I found several hampers setting around there that had trash in them, evidently, and found a screen there where they run the hamper up on an elevated platform and dump it and sort the trash through this screen and pull out any mail that might have inadvertently gotten in. The hampers that I saw were not all empty. There were some with contents in them. The contents was trash. I observed a gentleman there doing the sorting. He was not actually working at the time I was there. The purpose of sorting is to get rid of the trash. Of course, before it is disposed of, to look through it and extract any pieces of mail that might have been inadvertently mixed up in it."

"Q. Isn't it a fact, Mr. French, that the specific purpose of this assignment is to screen mail that might be lost in the trash? A. That is correct.

Q. That is quite regularly done, isn't it? A. Yes. It is heavier in the Christmas season than any other time of the year. They are no more particular with it at Christmas than they are any other time. They are always supposed to be careful with the sort of matter. We have to have added personnel to sort and handle mail during the Christmas season. And the probability of mail getting either inadvertently mishandled or lost becomes greater at that particular season—in the aggregate." [Rep. Tr. pp. 154, 155, 156, 157, 158 and 159.]

Concerning the personal knowledge of Mr. French that Kelley took possession of the packages involved he testified:

"Q. At no time did you see either of these packages, either 2, 3, or 4 in the defendant's personal possession?

A. Yes; I saw it in his possession when he picked that package off the sack rack. His back was turned to me when he picked it up. And then he swiveled around, facing me, and then went on around to a point where I was facing the trash pile. And he picked that up from the sack rack floor there and threw it some three or four feet directly into the trash pile. After he had dumped a couple of pails or buckets of wastepaper in it and got some sweeping compound, why, then he proceeded to sweep. That immediately followed the throwing of this package into the trash. Immediately following, he first pushed the racks up compactly after throwing the package, and then dumped the wastebaskets and the sweeping compound. Those were his duties, except for the picking up of the package." [Rep. Tr. pp. 162, 163 and 164.]

With reference to finding the packages the witness testified: "I found the hamper about two-thirds full. The two packages that I found in the basket were pretty far down. I would say they were approximately in the middle of the pile, although we did not take a ruler out and measure it. Before we finally got the packages we had to pull a lot of trash away and dig down into it to find them. And after having found the packages in this sack of trash I then immediately said to the defendant: "What did you do with that package?" I insisted that he did know something about it. And he equally as energetically denied any knowledge of it apart from any other trash." [Rep. Tr. pp. 152 and 153.]

Charles Franzen, assistant superintendent of mails, testified: "I first saw this package, Government's Exhibit for identification No. 2, addressed to Mrs. E. Johnson at 5 minutes past 5:00 A. M., December 21, 1946, in Inspector French's office. I first saw this wrapper from

a package, addressed to Mrs. A. S. Cluff, 2026 South Burnside Avenue, Los Angeles, California, marked Exhibit 3 for identification at the same time and place, and also the box, Exhibit 4 for identification, which was wrapped up, in one package with Exhibit 3. [Rep. Tr. pp. 4-8.] Mr. French gave me an instruction. I placed these packages on the third floor. I placed Exhibit 2 in the Pico local section at a point on the diagram, Exhibit 1, marked 'A.' [Rep. Tr. pp. 9, 10.] I put it on a sack rack. It is a rack, a platform about eight inches above, or so, a foot above the floor, and there is a metal rack on there in which the mail bags are hung. I put it on the wooden platform. I guess the purpose of the wooden platform is just to support the metal structure of the rack. [Rep. Tr. p. 11.] I put this package, Exhibits 3 and 4, back in the station E, paper section, on a tray. It is a tray about four feet long and a foot and a half wide, on castors. It is about a foot and a half high. The part that holds the mail, I would say is six inches deep. We pick up our mail out of the cases and roll it around to the different stations to work it, and work it off of these trays into the cases. There might have been two or three small papers there when I placed the package in it. I left and went on about my business. Between 5:30 and 5:40 Mr. French called me and asked me to go back in the Pico section and see if that first parcel, Exhibit 2, was still there. I did not find the parcel. About 5:45 Mr. French called me again. He asked me to come back. I went back, watched the hamper." [Rep. Tr. pp. 12, 13 and 14.]

The witness marks the letter "C" where he said he saw the hamper. "Mr. Kelley was pushing the hamper.

He left the hamper there and went back in the Station E paper section in that vicinity. One of the foremen came and told me that Mr. French was looking for me. I left this area then. We came back about five minutes later, I would say getting close to 6:00 o'clock. Mr. French and I approached the area. The general area where we placed the mark 'B.' Mr. Kelley was standing about here. Just standing. Mr. French asked me if the parcel, if 3 and 4 was where I had placed it, and the parcel was not there. I looked. Mr. French told me to get the foreman of the janitors, which I did. Mr. Kinny, I believe his name is. The two of us came back. Then we got the hamper from here at location 'C.' We brought it down here where Mr. French and Mr. Kelley was. We started looking through the hamper for these parcels. Mr. French, first, and he couldn't find it. He started pawing through it. We dumped it out on the floor finally. I found this one intact (referring to Government's Exhibit 2); then I found this (referring to Government's Exhibit No. 4), and then we found this (Government's Exhibit No. 3 for identification); Exhibit No. 2 was in the same condition as it was when I placed it on the Pico rack. These initials below here are my initials. I put my initials on this parcel to identify it. I put those on down at the inspector's office, later, after we had found the package. There are other initials on that package but I can't read them. They are not my initials. There are initials on the back, but they are not my initials. As to Government's Exhibits for identification 3 and 4, when I put these in Station E they were wrapped in one parcel. Those initials on Exhibit 3 were not there when I placed that wrapper on the table in Station E. I put my initials on there sometime later, down in the in-

spector's office. I don't know just when. When I went to 'A' I did not see the defendant Kelley anywhere.* I heard him; he was singing." [Rep. Tr. pp. 14-27.]

Cross-examination:

"This was about the time when our Christmas rush is just about the peak. Kelley was singing loudly. There were about three or four mail handlers hanging sacks at that time. They were by the mark 'A.' They were hanging sacks on these sack racks. They were scattered around in there [Rep. Tr. pp. 30-33]; Exhibits 3 and 4 were placed upon a sack rack resting on some wooden post or platform. In the same area in which I mentioned a moment ago that there were three or four people working. Where I made the mark 'A.' They were Christmas temporary people, but I don't know them personally.

Q. By Mr. Townsend: The question is: That you don't know whether or not there were one janitor or 10 janitors in that area about that same hour of the morning, other than Mr. Kelley, do you? A. Only what I saw.

Q. They could have been there without you seeing them, I take it? A. Yes; they could have." [Rep. Tr. pp. 37 to 40.]

Roy Kinny was sworn as a witness for the Government. It was stipulated by counsel that he would testify as follows:

"That all the custodial laborers, including Mr. Kelley, were instructed that they were not to touch mail at any of the places where mail was customarily put or kept. He will also testify that if they found any mail or packages on the floor, or any places where mail did not belong,

they were to pick it up and put it on any of the tables or racks that were around there; and that if they found any money, they were to put it in a specific place that was maintained in which money should be put; that Kelley's particular duties were to sweep all areas, including the cleaning of the sack racks; that the instructions with regard to the handling of mail was contingent upon his knowledge that it was mail." [Rep. Tr. p. 167.]

It was also stipulated that:

"Mr. Kinny will testify that he was the supervisor of the custodial laborers and on that morning he assigned the custodial laborers to their various duties on the third floor; and he assigned Mr. Kelley to sweep the particular area concerning which all this discussion has been had." [Rep. Tr. p. 168, lines 17-22.]

The defendant Kelley testified as follows:

"I live at 1353 West 36th Street with my wife and have lived there for 25 years; have been employed in the United States Post Office for about 7 years. Prior to the time of my arrest I had never had any trouble or difficulty in connection with my employment. On the 21st day of December I worked. I worked on that morning. [Rep. Tr. pp. 176 and 177.] Punched in at 5:00 o'clock. Punched out at 5:30. Mr. Kinny is my foreman. There is an incinerator room down in that basement—just a sorting room down there where we put trash before we burn it. There is a man kept there by full time assignment in that assorting room. He is not classed as a custodian. He is classed as a postal mail handler. The purpose of his being there, the general function is, looking for mail that is lost in the tubs. On the morning of

December 21st I was assigned on the third floor on the west end of the building. It takes in three aisles, approximately about 60 feet and 150 feet deep—I mean 250 feet. Mr. Kinny has been my foreman ever since I have been there. I keep my tools down in the basement. I went by my tub where I keep my tools and carried my tools up with me. I have a box down there with rollers on it and I keep my tools in it. We are assigned the tools as well as duties. You pick up any hamper as long as it is an old one. They don't allow us to put rubbish or trash in one of the new tubs. Before we carry trash down there we put the trash in the hamper. Our instructions with regard to disposing of the hamper after we fill it up are to take it down to the basement. You don't carry it to the incinerator at all. You carry it to the assorting room. That is our specific instruction. I started sweeping in the northwest corner of the building. Swept south. The way the building is laid out, we start in the northwest corner and sweep it out to the center aisle. Then we go into the middle section and sweep it out to the center aisle. And then we come back and sweep it right on down to where we pick up our trash. I did sweep under the racks. The racks stand on little dollies, some of them, about four or five inches high from the floor. The rack itself sets on the rollers. I have a straight broom but I couldn't use it on pushing trash. That is to get in cracks where I can't get in with my push broom, just wherever that comes convenient for me to work with. I sweep the floor with a push broom. If we get some bulky trash we just reach down with our hands and pick it up. That particular morning I swept my trash all the way across the building. I did not take any notice to any mail of any kind that I observed to be

mail, because I didn't see any packages on the truck, because when I was sweeping we shove the trucks around to make room to get around so we can clean. A package could have been laying on the truck and had been shaken off by pushing the trucks around. Shortly after I had gone onto the assignment Mr. Kinny came up; this was before Mr. French and Mr. Franzen came up there. When Mr. French came up and called me. He called me and said, 'Kelley'? I said, 'Yes.' He says, 'Come here.' Down in the southwest corner, near the end of that particular Pico section of the building, I did not at any time notice any particular package that I took to be mail or that you knew was mail or that looked to me particularly like mail. These intervening racks are racks about two feet wide and about five or six feet long and about 18 to 30 inches high from the ground. And that particular rack I saw was piled up with packages, magazines and papers. I shoved it around to one side. Some mail fell off and I left it laying there. I did not throw any mail that I saw and knew to be mail in the trash pile. I never paid any attention to the trash until Mr. French and Kinny and Whitey—we always call the superintendent over there 'Whitey' because all we knew him by was 'Whitey.' At no time did I take any notice of any part of what my trash consisted of. Not for mail I didn't. I just picked it up and threw it in the hamper. Pick it up in the dust pan. At that particular time the dust pan was up at the other end. I just picked it up with my hands. The paper was heavy. This dust pan

was about middle ways of the building. It was not in my hamper at all. Therefore, at this particular time I took all the trash up with my hands. Picked up all the biggest trash. I did not notice any address on it to anybody. I have never been called into the office at any time during the seven years about their losing or mishandling of the mail or anything else that was mail. I have never been called in for putting mail in the trash hamper before. When Mr. French came over in the section where I was he called me. He says, 'Kelley?' I says, 'Yes.' He says, 'Come here.' I walked over to him and he says, 'What did you do with those two packages that you picked up a while ago?' I says, 'I never picked up any packages.' He said, 'Oh, yes; you did.' He said, 'Myself and Mr. So and So saw you.' He called 'Whitey' by his name. He said, 'Whitey laid down the packages there for the purpose of your picking them up.' I said, 'I didn't pick up any packages.' And by that time Kinny and Whitey came along together. Kinny came along there and said, 'What the hell is the matter?' I says, 'I don't know. He claims I picked up some mail here. I didn't do it.' And by that time Whitey goes over in the center and gets my tub and brings it over there and turned the tub upside down and we all looked through the trash. I helped them to look through the trash, and we found those two packages in there. And he said—Mr. French says, 'Here is a wrapper for one of the packages.' ” [Rep. Tr. pp. 178-191.]

Cross-examination: "On this particular morning I did sweep off sack racks in Pico Heights Station area. I swept the floor of the sack racks in the Pico Heights area on that morning. I swept all the racks that had floors on them. I testified that when I was down in this Section E area I pushed around a full table that was loaded with mail and things and some fell off. I just pushed a corner of it around; yes. I don't know how much fell off. I did not pick them up. Oh, there has been packages put in my tub and said I put them in, but I didn't put them in there. One morning a package was found in my tub. I called Mr. Kinny's attention to it and told him I didn't do it. That is the only occasion I can remember. I do not remember when that was, but I called Mr. Kinny's attention to it." [Rep. Tr. pp. 191 to 194.]

